No. 515

Office Supreme Court, U. S.
FILED
JAN 25 1951
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1950.

JOHN D. REILLY,

Petitioner,

v.

HON. HENRY W. GODDARD, United States District Judge,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT OR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK OR OTHER APPROPRIATE WRIT.

JOHN T. CAHILL,
Attorney for Petitioner,
63 Wall Street,
New York 5, N. Y.

WILLIAM J. MAHON,
MATHIAS F. CORREA,
Of Counsel.

January 24, 1951.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

TABLE OF CONTENTS.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement	3
Specification of Errors to be Urged	5
Reasons for Granting the Writ	6
(1) This Court has Jurisdiction to Grant the Relief Requested	6
(2) Importance of the Question Presented	8
(3) Conflicts in Existing Decisions	10
(4) The Rulings Below Are Erroneous	11
Conclusion	17

Table of Authorities.

Cases.

	PAGE
Boske v. *Comingore*, 177 U. S. 459 (1900)	8, 9
Connecticut Importing Company v. *Continental Distilling Corporation*, 1 F. R. D. 190 (D. Conn. 1940)	10
DeBeers Mines v. *United States*, 325 U. S. 212 (1945)	14
Ex parte Bransford, 310 U. S. 354 (1940)	7
Ex parte Kumezo Kawato, 317 U. S. 69 (1942)	8
Ex parte Peterson, 253 U. S. 300, 305 (1920)	7
Ex parte Simons, 247 U. S. 231, 239 (1918)	7
Federal Life Ins. Co. v. *Holod*, 30 F. Supp. 713 (M. D. Pa. 1940)	11, 13
Ford Motor Company v. *Ryan*, 182 F. 2d 329 (2d Cir., 1950), *cert. denied* 340 U. S. 851 (1950)	14
Harris v. *Walsh*, 277 Fed. 569 (D. C. Cir. 1922)	11, 12
In re 620 Church Street Corp., 299 U. S. 24, 26 (1936)	6
June v. *George C. Peterson Co.*, 155 F. 2d 963 (7th Cir. 1946)	10
Land v. *Dollar*, 330 U. S. 731, 734 n. (1947)	6
Loew's, Inc. v. *Martin*, 10 F. R. D. 143 (N. D. Ohio, E. D. 1950)	11
Los Angeles Brush Corp. v. *James*, 272 U. S. 701, 706 (1927)	7
McCullough v. *Cosgrave*, 309 U. S. 634 (1940)	8
Nardone v. *United States*, 308 U. S. 338 (1939)	15
O'Connell v. *Olsen and Ugelstadt*, 10 F. R. D. 142 (N. D. Ohio, E. D. 1949)	11
Peterson v. *Peterson*, 70 S. D. 385, 17 N. W. 2d 920 (1945)	11

PAGE

Reeves v. *Pennsylvania R. Co.*, 80 F. Supp. 107 (D. Del. 1948) 10, 14

The Sultana, 77 F. Supp. 287 (W. D. N. Y., 1948)..... 14

U. S. Alkali Export Association v. *United States*, 325 U. S. 196 (1945) 6, 14

United States v. *Burr*, 25 Fed. Cas. No. 14, 692d (Cir. Ct. Va., 1807)..... 8

United States v. *General Motors Corp.*, 323 U. S. 373, 377 (1945) 6

STATUTES.

Judicial Code (28 U. S. C., §§1254, 1651)..... 2, 6

Federal Rules of Civil Procedure, Rule 34.....2, 4, 9, 10, 13

Federal Rules of Civil Procedure, Rule 37(b)..... 16

TEXT.

4 Moore Federal Practice (2d Ed., 1950), 1169-1170.... 14

Supreme Court of the United States

OCTOBER TERM, 1950.

JOHN D. REILLY,

Petitioner,

v.

HON. HENRY W. GODDARD, United States District Judge,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT OR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK OR OTHER APPROPRIATE WRIT.

To The Honorable The Chief Justice of The United States and The Associate Justices of The Supreme Court of The United States:

Your petitioner respectfully prays that a writ of certiorari be issued to review an order of the United States Court of Appeals for the Second Circuit entered January 4, 1951 (R. 41) pursuant to the opinion of that Court (R. 40), denying a petition for a writ of mandamus directing the Honorable Henry W. Goddard, Judge of the United States District Court for the Southern District of New York to vacate an order (R. 38) requiring petitioner to make application to the Commissioner of Internal Revenue for certified copies of certain documents.

Your petitioner respectfully prays in the alternative for a writ of mandamus directing said Honorable Henry W. Goddard to vacate said order; or for other appropriate writ.

Opinions Below.

The opinion of the district court dated November 29, 1950 may be found in the record at page 35. It is not yet reported. The order of the district court dated December 15, 1950 may be found in the record at page 38.

The opinion of the court of appeals dated January 4, 1951 may be found in the record at page 40. It is not yet reported. The order of that court is contained in the record at page 41.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1254 and Section 1651 of the Judicial Code (28 U. S. C. §1254, 1651).

Questions Presented.

(1) Whether a district court may compel production of documents under Rule 34 of the Rules of Civil Procedure by directing a party to make application to the Commissioner of Internal Revenue for copies of such documents and to turn over such copies to the adverse party for inspection and copying where concededly the Commissioner has classified such documents as "confidential" and the court has no power to compel their production by subpoena.

(2) Whether upon motion for leave to file a petition for writ of mandamus the Court of Appeals should accept jurisdiction and pass upon the merits of the question presented by the action of the lower Court.

Statement.

The contested order of the district court was entered in a civil action now pending in that court under the name of *Nola Electric, Inc.*, Plaintiff, v. *John D. Reilly,* Defendant, Civil Action No. 44-396. That action is one for breach of contract in which the plaintiff alleges that in 1934 it paid an amount of approximately $46,000 to defendant in payment for 1700 shares of the stock of Todd Shipyards Corporation. It is further alleged that a contract was made to the effect that defendant would hold the stock until requested to turn it over to plaintiff. The complaint alleges further that a demand was made for the stock in 1942 and that the demand was refused. Subsequently, this action was commenced, in 1948.

During the course of examination before trial Mr. Reilly, the petitioner herein, was asked whether he had submitted a memorandum and written certain letters to various agents of the Bureau of Internal Revenue containing information relative to the shares of stock which are the subject of the present civil action. Such documents are alleged to have been submitted by petitioner in answer to inquiries from various agents of the Bureau of Internal Revenue relating to the tax affairs of the plaintiff. Defendant stated that he had no copies of such documents and no recollection of submitting or writing them.

Concededly it is the policy of the Commissioner of Internal Revenue adopted pursuant to authority given him by statute that documents of the type allegedly submitted to the Bureau by petitioner herein will not be produced in response to a subpoena served upon the Commissioner or his representative. Pursuant to the policy of the Commissioner such documents are classified by the Bureau as

"confidential" and copies of them are made available by the Bureau only to the writer or writers of the documents upon their request therefor.

Professing to have assurance that the documents actually do exist in the files of the Bureau of Internal Revenue, plaintiff in the action made a motion purporting to be under Rule 34 of the Federal Rules of Civil Procedure for an order requiring defendant to make application to the Commissioner of Internal Revenue for certified copies of the documents and, upon receiving copies, to turn them over to the plaintiff for inspection. The motion and supporting affidavits are contained in the record at page 3 .

This motion was resisted by petitioner on the ground that the documents were considered confidential by the Bureau and that the Bureau policy extended to him a privilege which he would not voluntarily waive. This is in accord with the well recognized power of Governmental agencies to withhold documents in their possession from court process in civil litigation. The affidavit opposing the motion is contained in the record at page 30 .

The district court decided in favor of plaintiff in an opinion dated November 29, 1950 (R. 35). An order was entered thereon dated December 15, 1950 (R. 38).

The order of the court contained an express provision staying the operation of the order in case application should be made by petitioner for a writ of mandamus or other appropriate writ in the Court of Appeals for the Second Circuit. Such stay was to last until 10 days following a decision of that court adverse to petitioner.

A motion for leave to file a petition for writ of mandamus was duly made in the court of appeals and argued before that court on January 2, 1951 (R. 1).

On January 4, 1951 that court issued an opinion and order denying the petition without consideration of the

merits on the ground that the order of the district court could be reviewed on appeal following final judgment or on appeal from a contempt order (R. 40).

On January 12, 1951 the district court signed an order further staying the effect of the order of December 15, 1950, in order to enable petitioner to present this petition to the Supreme Court of the United States.

Specification of Errors to be Urged.

(1) The district court exceeded its lawful powers in compelling the production by an order under Rule 34 of the Rules of Civil Procedure of documents whose production could not be compelled by subpoena because of a valid policy and regulation of an executive department of the Government.

(2) The district court exceeded its powers in compelling the production by an order under Rule 34 of the Federal Rules of Civil Procedure of documents as to which a valid governmental privilege exists.

(3) The court of appeals erred in holding petitioners' remedy by way of appeal to be adequate and thus declining to take jurisdiction and to consider the merits of the ruling of the district court.

(4) The court of appeals erred in failing to find that the order of the district court had exceeded the powers of the district court and thus was subject to review upon the petition for mandamus.

Reasons for Granting the Writ.

(1) This Court has Jurisdiction to Grant the Relief Requested.

Section 1254 of the Judicial Code gives this Court the widest possible power to supervise and correct the actions of courts of appeal by issuing the discretionary writ of certiorari. It is, of course, no objection to this Court's jurisdiction that the action of the court of appeals in this case did not constitute a final judgment. *Land* v. *Dollar,* 330 U. S. 731, 734 n. (1947); *United States* v. *General Motors Corp.,* 323 U. S. 373, 377 (1945).

The Court also has the jurisdiction to issue the writ under Section 1651 of the Judicial Code. *In re 620 Church Street Corp.,* 299 U. S. 24, 26 (1936).

That this case presents a situation appropriate for the issuance of the extraordinary writ is demonstrated by the decisions of this Court. Thus in *U. S. Alkali Export Association* v. *United States,* 325 U. S. 196 (1945) this Court granted certiorari under the "all writs" section of the Judicial Code to review the action of the district court refusing to dismiss the action on jurisdictional grounds.

The Court pointed out that review was appropriate because the question raised was whether or not the order of the district court had exceeded that court's powers. The question was accordingly reviewed on its merits although the decision was that the district court had not exceeded its powers.

It is submitted that the case at bar falls squarely within the *U. S. Alkali Export Association case.* The order of the district court, from which relief is sought here, is beyond the lawful powers of that court inasmuch as it compels the production of documents which were clearly immune from the court's subpoena power. The district court can-

not enlarge its powers by the device of an order directed to a private litigant rather than to the Government.

An additional ground for the issuance of a writ of mandamus in the instant case arises from the fact that, as is shown more fully in pages 14-16, *infra*, appellate review following a final judgment in the case will not be an adequate remedy to correct the prejudice which the order of the district court will cause petitioner.

There is no question of the power of this Court in such a situation to deal directly with the district court by way of mandamus. This Court has done so in many cases which, in so far as prejudice to the petitioner is concerned, are *a fortiori* authorities for the granting of the writ in the instant case. This is particularly true where the subject of the review concerns the enforcement of the Federal Rules of Civil Procedure which by law it is the duty of this court to formulate and put in force.

Thus in *Los Angeles Brush Corp.* v. *James*, 272 U. S. 701, 706 (1927) this Court, in reviewing an order referring a patent case to a master for trial, said:

> " * * * we think it clear that where the subject concerns the enforcement of the Equity Rules which by law it is the duty of this court to formulate and put in force, and in a case in which this court has the ultimate discretion to review the case on its merits, it may use its power of mandamus and deal directly with the district court in requiring it to conform to them. * * * "

This Court has on many other occasions issued writs of mandamus to a district court. *Ex parte Simons*, 247 U. S. 231, 239 (1918) (Mandamus granted to compel jury trial); *Ex parte Peterson*, 253 U. S. 300, 305 (1920) (Mandamus to correct appointment of an auditor in law case); *Ex parte Bransford*, 310 U. S. 354 (1940) (Mandamus is proper

remedy where district judge refuses to convene a three-judge court); *McCullough* v. *Cosgrave*, 309 U. S. 634 (1940) (Mandamus granted to vacate an order of the district court referring cases to a master for trial); *Ex parte Kumezo Kawato*, 317 U. S. 69 (1942) (Mandamus is proper remedy to vacate an order of the district court erroneously abating an action).

(2) Importance of the Question Presented

The basic question presented by this petition involves a conflict between the right of a Government agency to withhold documents in its possession from general use and the right of litigants in a private civil action to get full discovery. The question has been regarded as an important one since the earliest times of our country and few cases present such a long line of authorities. The earliest cases go back to the time of Aaron Burr (*United States* v. *Burr*, 25 Fed. Cas. No. 14, 692d (Cir. Ct. Va., 1807) and the question has been the subject of comment by the Attorney General of the United States on many occasions (e.g. 25 Ops. Atty. Gen. 326 (1900), 40 Ops. Atty. Gen. 45 (1941).

Whatever may be said with respect to the right of the executive arm of government to refuse to honor process of the judicial or legislative arms directed to documents in its possession, it is settled by the decisions of this Court that Congress may by statute confer upon executive departments the power to put documents in the files and records of such departments beyond the power of court subpoena. *Boske* v. *Comingore*, 177 U. S. 459 (1900).

In the *Boske* case this Court dealt specifically with the power of the Bureau of Internal Revenue, the very agency whose records are involved in the case at bar, to put such records beyond the reach of judicial process. As this

Court pointed out in the *Boske* case, clearly the reason for placing such records beyond the reach of the subpoena powers of the Court is to avoid, in the interests of the government, precisely what will be accomplished by the order here sought to be reviewed. For, it is deemed in the interest of the government in encouraging the submission of information to it to make provision that such information not be used against the informants in private civil ligitation.

The question presented by the instant petition then, is whether, notwithstanding the policy of the Commissioner placing the documents beyond the reach of subpoena, their production can be compelled by an order under Rule 34 of the Rules of Civil Procedure predicated upon the fiction of "control". The so-called "control" of the informant over the document he has submitted consists solely in the fact that the general policy of the Commissioner is to provide him with a copy of the document he has submitted upon his request. It should, we believe, be obvious that it is not the purpose of the Commissioner in making this provision in his policy to thwart and render ineffective that part of his policy which renders such documents immune from compulsory production in private civil litigation.

The question presented, therefore, is one of importance and complexity with respect to the construction, interpretation and application of the Rules of Civil Procedure formulated and put in force by this Court. It is a question which has caused considerable difficulty to Federal courts throughout the country engaged in applying the Rules in all kinds of litigation. It has resulted in conflict of decision among these courts. The question is one peculiarly appropriate for decision by this Court as the final arbiter of the construction of the Rules of Civil Procedure.

Additionally, the petition here presents the related question as to whether or not the policy of the Commissioner

with respect to the documents does not render them privileged for all purposes including the purposes of Rule 34.

Finally, this petition also raises the question of the availability of the extraordinary remedy of mandamus in cases where review on appeal following final judgment is demonstrated to be inadequate. The question has assumed great importance because of the stringent Federal rules prohibiting appeals from interlocutory judgments.

(3) Conflicts in Existing Decisions

The briefs which were filed in the lower courts as well as the opinion of the district court reveal that there are many conflicts in the existing decisions on the point here raised.

Thus question has arisen as to the power of the Federal courts under Rule 34 of the Rules of Civil Procedure to compel production by a party of copies of his Federal income tax returns. Federal income tax returns though constituted "public records" by statute are by regulation of general application adopted pursuant to the statute placed beyond the reach of the power of the courts to compel their production by subpoena. The regulations provide, however, that a taxpayer may upon application receive a certified copy of his Federal income tax return and some Federal courts have held the production of such copies may be compelled by an order under Rule 34. *Connecticut Importing Company* v. *Continental Distilling Corporation*, 1 F. R. D. 190 (D. Conn. 1940); *June* v. *George C. Peterson Co.*, 155 F. 2d 963 (7th Cir. 1946); *Reeves* v. *Pennsylvania R. Co.*, 80 F. Supp. 107 (D. Del. 1948).

Other Federal courts and the highest court of at least one state have held exactly the contrary. These courts have taken the view that since the Federal income tax returns have been placed beyond the reach of the subpoena powers

of the courts their production cannot be compelled by indirection. These courts have also uniformly held that the statute and regulations placing Federal income tax returns beyond the reach of the subpoena power of the courts constitute them privileged. *Loew's, Inc.* v. *Martin,* 10 F. R. D. 143 (N. D. Ohio, E. D. 1950); *O'Connell* v. *Olsen and Ugelstadt,* 10 F. R. D. 142 (N. D. Ohio, E. D. 1949); *Peterson* v. *Peterson,* 70 S. D. 385, 17 N. W. 2d 920 (1945).

The court in the case at bar has gone even further than the courts in the income tax cases in that the records here sought to be obtained are not only put beyond the reach of subpoena but are also, in antithesis to the "public record" classification of income tax returns, classified as "confidential". In such a situation, the courts, at least in Selective Service cases, have held unanimously that records so classified are privileged. And in such cases it has been held that when consent of the informant is required, it is voluntary consent which is meant and that the court will not enforce "involuntary waiver". *Federal Life Ins. Co.* v. *Holod,* 30 F. Supp. 713 (M. D. Pa. 1940); *Harris* v. *Walsh,* 277 Fed. 569 (D. C. Cir. 1922).

By refusing to review the merits of the petition, the court of appeals has permitted the lower court to depart from the accepted and usual course of judicial proceedings. Such an action presents a case which is appropriate for the exercise of the supervisory jurisdiction of this Court.

(4) The Rulings Below Are Erroneous

It is respectfully submitted that the ruling of the District Court below is erroneous and exceeds the power of that Court. As has been shown it has the effect of compelling by indirection the production of documents whose production may not be compelled directly.

As we have also shown the order of the district court is erroneous in that it rests upon a fiction of "control" based upon the interpretation of the policy of the Commissioner of Internal Revenue which has the effect of defeating the purpose of intent and that policy.

Finally, the order is erroneous in that it has the effect of compelling the waiver by petitioner of a valid privilege, thereby destroying the privilege.

The whole concept of privilege is built on the theory that certain relevant documents are protected from discovery and are not admitted in evidence because a higher purpose will be served by their protection and exclusion. In the case at bar, the privilege finds its basis in the power of the Government, by regulation or policy, to govern the custody and availability of files in its possession. In furtherance of this power, Governmental agencies have laid down rules stating the circumstances under which documents in their files may be made available to interested parties.

In certain types of cases, the documents are made available only to the person who submitted them. In such cases it has been held that the fact that the documents are not subject to production under subpoena is sufficient to constitute them privileged.

Where, in addition, however, such documents are classified as "confidential," it is uniformly held that a privilege has been created, running to the informant. The purpose of such privilege is, of course, to encourage the free submission of information to Governmental authorities for their use in the prosecution of their duties.

Such is the situation arising under the Selective Service Regulations where cases have universally held that a privilege exists running to the informant. See *Harris* v. *Walsh, supra,* where the court said:

> "[5] It will be observed that the learned justice fell into error in holding the exclusive right of waiver in the registrant. The right of waiver as to this affidavit is in the informant, who signed and swore to the document. Though its contents are known, and the name of the author is known, the fact remains that it cannot be proved so long as she refuses to waive the privilege, a protection thrown around her by the regulations, which, in this instance, have the force and effect of law, and, so long as she elects to avail herself of the protection which the law thus affords, the Adjutant General, as custodian of the affidavit, cannot be compelled to produce it in court to be used to her disadvantage * * *" (p. 573).

It is apparent that in such cases the district court has no power to order the privileged person to consent to discovery of the information. Thus, in *Federal Life Insurance Company* v. *Holod, supra,* the court said:

> "* * * It is evident that the restriction on the power of the Courts was intended to make the information furnished to the Department privileged communications. To effectuate the purpose of these restrictions, it is necessary that the Courts should not do indirectly that which they cannot do directly. An order requiring the defendant to consent would not be in compliance with the spirit of the regulations nor the provisions thereof. The consent which would be thus obtained would not be the voluntary consent contemplated by section eleven.
>
> "The Court, therefore, is forced to the conclusion that it does not have the power to make the order requested, and that the records in question are privileged within the meaning of Rule 34 of the Rules of Civil Procedure" (p. 714).

The opinion of the district court below is in plain conflict with these decisions. It is based upon cases involving

income tax returns which the court purported to follow. *Reeves* v. *Pennsylvania R. Company, supra; The Sultana,* 77 F. Supp. 287 (W. D. N. Y., 1948). It is submitted that these decisions even if they are correct, which is questionable, are not controlling in the instant case. This follows because of the difference in the character of the information sought in the income tax return cases from that of the information sought in the instant case. Unlike that involved in the income tax cases the information sought here is of a character classified as "confidential". Cf. 4 *Moore Federal Practice* (2d Ed., 1950), 1169-1170.

It is also submitted that the decision of the court of appeals in refusing to review the merits of the district court's decision on a motion for leave to file a petition for writ of mandamus was erroneous. It is in conflict with those decisions of this Court which hold that review by issuance of extraordinary writ is appropriate where the question presented is one as to whether or not the district court exceeded its powers. *U. S. Alkali Export Association* v. *United States, supra; DeBeers Mines* v. *United States,* 325 U. S. 212 (1945).

Additionally, the decision of the court of appeals that review is not appropriate in the instant case is in conflict with those authorities, including its own decisions, which hold that such review should be granted where the error complained of will not be correctable on appeal following final judgment of the case, e.g., *Ford Motor Company* v. *Ryan,* 182 F. 2d 329 (2d Cir., 1950), *cert. denied* 340 U. S. 851 (1950).

If the court below has, as petitioner here contends, erroneously held privileged documents non-privileged, the prejudice which will result to petitioner in this case from such a ruling will not be correctable on appeal.

It is true that upon appeal from final decision in the case the court of appeals could correct an error which consisted of the erroneous admission in evidence of privileged documents. The scope of the privilege, however, is broader than the mere rendition of the documents inadmissible in evidence. The privilege if it exists protects against disclosure of the documents.

The documents in question are sought not only with a view to their ultimate admission in evidence in the case, but also with a view to their use as leads to the discovery of other and admissible evidence. The prejudice which will result to the petitioner from this use of the documents, once the privilege is violated and they are disclosed, will not be correctable on appeal inasmuch as there is no rule of law applicable to civil actions which would render otherwise admissible evidence inadmissible simply because it was discovered through leads furnished by a wrongly disclosed privileged document.

A comparable situation under criminal law is presented by the doctrine enunciated by this Court in the case of *Nardone* v. *United States,* 308 U. S. 338 (1939) where the court held that not only must "wire tap" evidence, itself, be excluded in a criminal prosecution, but also that where there was evidence of the use of information secured by wire-tapping to obtain other evidence, such other evidence should also be excluded. The erroneously permitted use of a privileged document to lead to the discovery of other evidence in a civil suit presents the same evil but no analogous remedy is available. Hence the necessity for the immediate issuance of the writ.

Petitioner's apprehension that disclosure of the privileged documents in the instant case will result in this type of incorrectable prejudice to him is far from chimerical.

The Federal Rules of Civil Procedure relating to discovery expressly recognize that evidence may be sought in a discovery proceeding for the primary or even the sole purpose of obtaining leads to other evidence. Additionally, counsel for plaintiff in the case at bar has expressly stated that plaintiff intends, if it is successful in obtaining the documents it seeks, to use them as a basis for further discovery proceedings.

Nor can petitioner obtain relief by simply failing to obey the district court's order and then appealing from any final action taken by the court to enforce it. The penalties provided by Rule 37(b) of the Federal Rules of Civil Procedure are so broad and so severe that a litigant can hardly afford to run the risk of incurring them in order to provide an opportunity for appeal, if indeed such opportunity is available.

In respect of this last point, the court of appeals fell into error in its short opinion dismissing the motion for leave to file a petition for writ of mandamus. In that opinion, the court said:

> "... it [the order] can also be reviewed on order punishing the defendant for contempt." (R. 46).

Leaving out of account the fact that contempt is perhaps the least likely remedy provided by Rule 37(b) which the court might choose, it appears that even if this remedy were chosen review would not be available following it. Indeed, counsel for plaintiff moved for rehearing before the Court of Appeals on this ground alone, conceding that such remedy is not adequate (R. 41). The opinion of the court of appeals denying rehearing reserves the point for later decision, thus offering no aid to petitioner here.

Conclusion.

For the foregoing reasons the writ requested should be granted.

January 24, 1951.

Respectfully submitted,

JOHN T. CAHILL,
Attorney for Petitioner,
63 Wall Street,
New York 5, N. Y.

WILLIAM J. MAHON,
MATHIAS F. CORREA,
Of Counsel.